



'BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
IRVING M. AND NORMA W. APTAKER)

Appearances:

For Appellants: Irving M. Aptaker, in pro. per.

For Respondent: Jeffrey M. Vesely
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Irving M. and Norma W. Aptaker against a proposed assessment of additional personal income tax in the amount of \$360.26 for the year 1975. Since appellants have paid the tax after the filing of this appeal, this appeal is treated as if it were from the denial of a claim for refund, pursuant to section 19061.1 of the Revenue and Taxation Code.

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The issue presented is whether appellants are entitled to a deduction for educational expenses.

In January of 1971, appellant Norma W. Aptaker obtained employment with the Pasadena Unified School District (PUSD) as an instructional aide. As a high school graduate, she satisfied the educational requirements for that position. It is the function of instructional aides in the PUSD to assist regular licensed teachers in the performance of their duties. Many of the aides, including appellant, prepared lesson plans and conducted classes under the supervision of credentialed teachers.

In 1971 the PUSD commenced a formal Professional Growth Program for its classified employees, including the instructional aides. It encouraged its employees to participate. Pursuant to the optional program, an increment in salary for professional growth is earned by participating employees upon completion of 15 equivalent semester units of approved course work; the salary increment earned is an amount equal to three percent of the monthly base salary, eligibility for which commences as of June 30 of the year in which the units are completed. Employees participating are required to take certain mandatory courses totalling 15 units, including those related to the employee's specific classification and approved by the PUSD's personnel division, and other pertinent courses approved by the division. After the mandatory courses are satisfactorily completed, the district employees are encouraged to take additional ones, in blocks of 15 units, selected from areas considered satisfactory according to evaluation criteria established by the PUSD. The program is designed primarily to maintain and improve the skills of the employee in his or her present job classification.

Appellant was also specifically encouraged to participate by the principal of the school where she was employed. She commenced participating in the program in 1971, and continued to do so thereafter. As already indicated, the courses completed by appellant were related to her duties and were designed to improve her skills in her present job classification. In fact, the school principal has indicated that appellant participated specifically to fulfill her responsibilities as an instructional aide.

Many instructional aides participate in the program. Most of the aides in the PUSD remain in that job classification for many years; such individuals

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consider it a career position and do not intend to become certified teachers. These include aides who participate in the growth program.

In written statements and at the hearing before this board, appellants have strenuously made the following assertions. When appellant commenced taking the courses in 1971, she did not plan to acquire a Bachelor of Arts degree. In subsequent years, her main purpose in participating was to improve her abilities as an instructional aide. When enrolling for the approved courses in 1975 (courses which also ultimately enabled her to acquire a Bachelor of Arts degree in January of 1976), she did not plan to become a certified teacher. After acquiring that degree, she was not initially disposed to continue her education in 1976 and acquire an elementary teacher's credential, but thereafter she decided to do so.

In June of 1976, she completed the necessary additional courses and acquired the credential. Since September of that year she has been employed by the PUSD as a substitute teacher. In view of the limited number of available positions, it does not appear that she will become a permanent teacher in the foreseeable future.

On the 1975 return appellant claimed a business expense deduction in the amount of \$3,273.00 as a result of that year's education expense. Relying upon the objective considerations that appellant received a Bachelor of Arts degree, a teacher's certificate, and a substitute teacher's position because of the education she received under the program, respondent concluded that the expense constituted nondeductible personal expense.

Section 17202 of the Revenue and Taxation Code provides a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Since the statute does not explicitly address educational expenses, the applicable regulation takes on added significance. (James Duffey, ¶ 77,143 P-H Memo. T.C. (1977); Richard N. Warfsman, ¶ 72,137 P-H Memo. T.C.. (1972).) The applicable regulation, in effect during the year in question, provided in pertinent part that educational expenditures are deductible if the education is undertaken primarily for the purpose of: "(A) Maintaining or improving skills required by the taxpayer in his employment or other

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trade or business." The regulation also stated:

Whether or not education is of the type referred to in subparagraph (A) of this paragraph shall be determined upon the basis of all the facts of each case. If it is customary for other established members of the taxpayer's trade or business to undertake such education, the taxpayer will ordinarily be considered to have undertaken this education for the purposes described in subparagraph (A) of this paragraph.

* * *

Expenditures made by a taxpayer for his education are not deductible if they are for education undertaken primarily for the purpose of obtaining a new position or substantial advancement in position, or primarily for the purpose of fulfilling the general educational aspirations or other personal purposes of the taxpayer. The fact that the education undertaken meets express requirements for the new position or substantial advancement in position will be an important factor indicating that the education is undertaken primarily for the purpose of obtaining such position or advancement, unless such education is required as a condition to the retention by the taxpayer of his present employment. In any event, if education is required of the taxpayer in order to meet the minimum requirements for qualification or establishment in his intended trade or business or specialty therein, expense of such education is personal in nature and therefore is not deductible. (Emphasis added.) (Former Cal. Admin. Code, tit. 18, reg. 17202(e), repealed, Feb. 21, 1979.)

Based upon our consideration of all the evidence in the record, including that presented at the hearing, it is our opinion, and we so hold, that the primary purpose for which the appellant undertook the education that caused her to incur the expense here involved, was that of "maintaining or improving skills required by the taxpayer in [her] employment" as an instructional aide. Thus, pursuant to the applicable regulation, appellants are entitled to the deduction.

In arriving at this conclusion, we have given particular consideration to the following facts established

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by the evidence:

(1) The position of instructional aide in the PUSD is not merely a temporary position occupied solely by persons intending to become licensed teachers (Cf., Arthur M. Jungreis, 55 T.C. 581 (1970)), but is an established career position for those deciding to remain in that classification.

(2) It is customary in the PUSD for the aides to participate in the educational program solely to maintain and improve their skills as such aides. Under such circumstances, pursuant to the applicable regulation, appellant should ordinarily be considered to have undertaken the education to maintain and improve her skills in her then existing occupation as an instructional aide. (See former Cal. Admin. Code, tit. 18, reg. 17202(e), repealed, Feb. 21, 1979, above.)

(3) An increment in salary while still retaining their existing job classification was earned by participating aides upon completion of a designated number of class units. (See Ruth Domigan Truxall, ¶ 62,137 P-H Memo. T.C. (1962).)

(4) The courses completed were related to appellant's specific classification.

(5) Instructional aides were encouraged by the district and by the principal of the school where appellant was employed to participate in order to maintain and improve their skills in their present occupation.

Under the applicable regulation, it is the primary purpose at the time the courses are actually undertaken, not any subsequent change of intent, which governs. (Welsh v. United States, 210 F. Supp. 597 (N.D. Ohio, E.D. 1962, affd., 329 F.2d 145 (6th Cir. 1964.)) Pursuant to the pertinent regulation, it is manifest that a taxpayer's motives for undertaking educational courses are relevant. A taxpayer is entitled to deduct such expenses, even if the courses qualify him for a new trade or business, if the taxpayer's primary purpose at the time the education is undertaken is to improve skills in carrying on a pre-existing vocation. (Welsh v. United States, supra; Greenberg v. Commissioner, 367 F.2d 663 (1st Cir. 1966); see also Fortney v. Campbell, Jr., 13 A.F.T.R.2d 1619 (D.C. N.D. Tex. 1964); Kenneth G. Bouchard, ¶ 77,273 P-H Memo. T.C. (1977).)

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Respondent contends that because the education in question enabled appellant to acquire a Bachelor Of Arts degree, and helped her obtain an elementary teacher's certificate and qualify for a new profession as a certified teacher, the expense is not deductible, irrespective of appellant's primary intent. We do not agree. Pursuant to the current regulation adopted for federal income tax purposes in 1967 (Treas. Reg. § 1.162-5 (b)(3)), if it were applicable here, respondent's contention would apparently be correct.^{1/} Pursuant to that regulation, expenditures for education which is part of a program of study being pursued by the taxpayer which will lead to qualify him in a new trade or business are not deductible, irrespective of the taxpayer's intention when undertaking the education. (See Kenneth G. Bouchard, supra.)

However, as we have already shown, during the year in issue, respondent's applicable regulation was the one cited above, under which the "primary purpose" or subjective test is used. (See Appeal of John H. Roy, Cal. St. Bd. of Equal., March 8, 1976.) The federal cases cited by respondent in support of its contention were governed by the inapplicable language of the present federal regulation.

Respondent's applicable regulation was not repealed until February 21, 1979, and the repeal was effective thirty days thereafter. (Gov. Code, § 11422.)^{2/} Since the repeal, respondent has not actually-adopted any new regulation on the subject. In view of the absence of a regulation and the similar language of the pertinent state and federal statutes, the existing federal regulation would apply with respect to current tax periods. (See Cal. Admin. Code, tit. 18, reg. 19253.) However, this was clearly not so for the year 1975.

For the foregoing reasons, we have concluded that respondent's action should be reversed.

^{1/} Prior to the change in 1967, the pertinent language in both the federal and state regulations was substantially similar.

^{2/} It is interesting to note that this appeal was heard on November 30, 1978, slightly less than ninety days prior to repeal of the regulation.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that **the** action of the Franchise Tax Board in denying the claim of Irving M. and Norma W. Aptaker for refund of personal income tax in the amount of \$360.26 for the year 1975, be and the same is hereby reversed.

Done at Sacramento, California, this 4th day of March , 1980, by the State Board of Equalization.

, Chairman
, Member
, Member
_____, Member
_____, Member